No. 89-1793

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,
v.
THOMAS M. GAUBERT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. SENATOR CHARLES GRASSLEY, U.S. REPRESENTATIVES DAN BURTON, FRED GRANDY, JIM LEACH, PATRICIA SCHROEDER, NORMAN SHUMWAY, AND THOMAS TAUKE, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether supervisory actions that are taken by federal regulators of financial institutions and that require the exercise of policy discretion fall within the "discretionary function" exception to the Federal Tort Claims Act, regardless of whether those actions may be categorized as "operational" in nature.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nation-

wide. WLF believes that the tremendous increase in the number of lawsuits in our courts in recent years and the willingness of courts to recognize new legal theories under which to bring suit have adversely affected our free enterprise system. Accordingly, WLF devotes a substantial amount of time to finding ways to reduce litigation. To that end, WLF has appeared as *amicus curiae* before this Court as well as other federal and state courts in cases that touch upon efforts to control litigation growth. *See, e.g., Ingersoll-Rand Co. v. McClendon, cert. granted*, 58 U.S.L.W. 3657 (U.S. April 16, 1990); *Pacific Mutual Life Ins. Co. v. Haslip, cert. granted*, 58 U.S.L.W. 3628 (U.S. April 2, 1990); *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990).

Sen. Charles Grassley (Iowa) is a Member of the United States Senate. Reps. Dan Burton (Ind.), Fred Grandy (Iowa), Jim Leach (Iowa), Patricia Schroeder (Colo.), Norman Shumway (Calif.), and Thomas Tauke (Iowa) are Members of the United States House of Representatives. Each is vitally concerned that our nation's savings and loan industry be subject to sufficient federal government regulation to ensure its solvency, that costs to the taxpayers associated with failures of savings and loan institutions be kept to an absolute minimum, and that those responsible for S&L failures be made to reimburse the federal government for losses caused by those failures.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court on several occasions in cases dealing with the conflict between the rights of individuals and the collective rights of society.

Amici believe that the best interests of American taxpayers will be served if the Court does not permit suits brought under the Federal Tort Claims Act to go forward under circumstances such as those present in this case. *Amici* believe that the ability of federal officials to police the banking and S&L industries will be severely impaired if regulators must be concerned that their every action is subject to second-guessing in the federal courts.

Amici submit this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

Amici are, in the interests of brevity, omitting any detailed statement of the facts of this case. *Amici* adopt by reference the statement of facts contained in Petitioner's brief.

In brief, Respondent Thomas Gaubert in 1983 acquired control of Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas. Mr. Gaubert became chairman of the board, arranged for the institution to change its name to Independent American Savings Association ("IASA"), and embarked IASA on a meteoric expansion program. Mr. Gaubert's activities quickly brought him into conflict with officials at the Federal Home Loan Bank Board, the federal agency charged with overseeing IASA's activities, and the Federal Home Loan Bank of Dallas (referred to hereinafter collectively as the "Bank Board").

Disconcerted by what they viewed as Mr. Gaubert's improper management of IASA's affairs, Bank Board officials took a series of actions against Mr. Gaubert. In December 1984, Bank Board officials entered into an agreement with Mr. Gaubert whereby he agreed to resign from management positions at IASA, to refrain from any participation in the management of the institution, and to accept limitations on his ability to vote or transfer IASA stock. In December 1985, Mr. Gaubert -- faced with the threat that the Bank Board would commence a regulatory proceeding designed to bar him from involvement with any federally insured thrift -- signed an agreement with the Bank Board agreeing to remove himself permanently from IASA's management and not to serve as an officer or director of any federally insured thrift institution without prior approval. In April 1986, Bank Board officials -- by threatening further regulatory proceedings -- forced the resignation of IASA's board of directors and arranged the selection of a new board chosen by the Bank Board.

From that point on, Bank Board officials had a significant influence on the day-to-day operations of IASA. Respondent alleges that Bank Board officials regularly advised IASA's new management on such issues as the hiring of a particular individual to serve as a consultant, the placement of subsidiaries into bankruptcy, resolution of a pay dispute involving IASA officers, and litigation strategy.

IASA was closed in May 1987 and placed under federal receivership; taxpayer losses associated with IASA's failure have been estimated at approximately $400 million. While both parties agree that IASA was insolvent in May 1987, they disagree regarding how IASA got that way. Petitioner contends that Mr. Gaubert's management activities during 1983-84 led

directly to the institution's insolvency. Mr. Gaubert contends that when he relinquished control IASA was in a strong financial position, and that the Bank Board's subsequent, continual involvement in the institution's day-to-day management led to IASA's insolvency.

Mr. Gaubert filed suit against the U.S. government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, claiming that he suffered $100 million in damages as a result of the Bank Board's negligent regulation of IASA's affairs. The district court dismissed the lawsuit, but the United States Court of Appeals for the Fifth Circuit reversed and remanded -- finding that the "discretionary function" exception to the FTCA did not bar Mr. Gaubert's suit. On June 18, 1990, this Court agreed to review the court of appeals' decision.

SUMMARY OF ARGUMENT

In adopting the FTCA, Congress permitted the United States to be subject to tort suits but placed very strict limits on the types of government actions that could form the basis for such suits. One such limitation is the "discretionary function" exception, 28 U.S.C. § 2680(a). That exception precludes FTCA challenges to legislative and administrative decisions grounded in social, economic, and/or political policy. The exception has its roots in the constitutional doctrine of separation of powers, for without it courts would repeatedly be called upon to second-guess policy judgments of the other branches of government.

Actions arising out of the regulatory programs of federal agencies are a classic example of "discretionary functions" that are virtually always exempt from FTCA challenge. Regulators virtually always have wide-rang-

ing discretion to take any one of a number of actions toward those whom they regulate, and courts have no business second-guessing the policy choices of regulators inherent in their choices of which actions to take. Only occasionally will a statute, regulation, or federal policy so restrict a regulator's options that it can be said that he lacks authority to apply his own discretion; only then will the discretionary function exception be inapplicable to the regulator's actions.

The regulatory system at issue here is one involving regulators who have been given extremely broad discretion to take whatever steps they believe are necessary to preserve the integrity of our nation's depository insurance system. Mr. Gaubert does not like the manner in which Federal Home Loan Bank Board officials regulated his thrift; but it cannot be denied that those officials had the authority to take all such regulatory actions, and they took such actions in the exercise of their discretionary authority. Accordingly, the discretionary function exception bars the suit that Mr. Gaubert has brought against the government.

Permitting suits such as Mr. Gaubert's to go forward would undermine regulation of the deposit insurance system. Regulators would likely become reluctant to use the informal regulatory methods that would be the most frequent targets of FTCA suits. Instead, regulators would be forced to begin formal regulatory actions at the first indication of any trouble at an institution, thereby increasing the costs of regulation to all concerned. Moreover, marshaling the government's limited resources for the defense of what would doubtless be a huge influx of lawsuits challenging the government's regulation of financial institutions would require the government to divert some of its resources away from efforts to recover the S&L bailout costs

from crooked S&L operators and away from efforts to bring crooked operators to justice.

ARGUMENT

I. THE ACTIONS OF FEDERAL REGULATORS AT ISSUE IN THIS SUIT ARE PROTECTED UNDER THE "DISCRETIONARY FUNCTION" EXCEPTION OF THE FEDERAL TORT CLAIMS ACT

This case requires the Court once again to define the scope of the "discretionary function" exception of the FTCA, 28 U.S.C. § 2680(a), which provides that the federal government may not be held liable under the FTCA based upon the exercise of a "discretionary function" by government agencies or employees.[1] While defining the precise contours of the discretionary function exception has proven to be a difficult task in view of § 2680(a)'s less-than-precise wording, the Court has had little difficulty in divining why Congress included the exception within the FTCA: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through an action in

---

[1] 28 U.S.C. § 2680(a) provides in relevant part:

> The provisions of [the FTCA] shall not apply to --
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

tort." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense [Varig Airlines]*, 467 U.S. 797, 814 (1984).

If one keeps in mind the purpose of the discretionary function exception (as enunciated in *Varig Airlines*), the resolution of the issues raised in this case is not difficult. The administrative actions being challenged in this case are securely grounded in social, economic, and political policies adopted by the federal government. Accordingly, any judicial second-guessing of those actions is wholly unwarranted.

A. While Not All Acts Arising Out of Regulatory Programs of Federal Agencies Are Covered Under the Exception, the Vast Majority of Such Acts Are Covered

In *Berkovitz v. United States* 486 U.S. 531, 108 S.Ct. 1954, 1959-60 (1988), this Court explicitly rejected the contention that the discretionary function exception "precludes liability for any and all acts arising out of the regulatory programs of federal agencies." The Court held that the plain language of the exception -- protection for "discretionary" functions rather than for "regulatory" functions -- precludes such a sweeping claim. *Id.*

Nonetheless, the legislative history of the FTCA and decisions of this Court make clear that Congress intended that the discretionary function exception apply to the vast majority of acts arising out of federal regulatory programs. For example, early drafts of bills that later became the FTCA included exceptions from the waiver of sovereign immunity for claims based on any and all activities of specific federal agencies, notably the Federal Trade Commission and the Securities and Exchange Commission. *See, e.g.*, H.R. 5373, 77th Cong., 2d Sess. (1942); H.R. 7236, 76th Cong., 1st Sess. (1940); S. 2690, 76th Cong., 1st Sess. (1939). Later drafts omitted those exceptions and replaced them with language identical to the language of § 2680(a) as ultimately adopted. Backers of the bill considered it "unnecessary to except by name such agencies as the Federal Trade Commission and the Securities and Exchange Commission, as had earlier bills, because the language of the discretionary function exception would 'exemp[t] from the act claims against Federal agencies *growing out of their regulatory activities*.'" *Varig Airlines*, 467 U.S. at 810 (emphasis added by court), *quoting* Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess. 8 (1942). In other words, Congress intended that, as a general rule, the regulatory activities of federal agencies not be subject to second-guessing in an FTCA suit.

In confirming that general rule in *Dalehite v. United States*, 346 U.S. 15 (1953), the Court quoted extensively from the legislative history of the FTCA. The Court cited language from the House Report on H.R. 6463 that explained that while "the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies," the discretionary function exception was "designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved." *Dalehite*, 346 U.S. at 29 n.21, *quoting* H.R. Rep. No. 2245, 77th Cong., 2d Sess. at 10. The Court gave a similar reading to the FTCA's legislative history

in *Varig Airlines*. *See id.*, 467 U.S. at 808-10. The Court said, "[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 813-14.

In sum, while *Berkovitz* teaches that the discretionary function exception does not provide a blanket immunity for any and all acts arising out of the regulatory programs of federal agencies, Congress did intend the exception to keep to a minimum judicial second-guessing of such acts.

B. Acts Arising Out of the Regulatory Programs of Federal Agencies Are Covered by the Exception Unless a Specific, Mandatory Requirement Restricts the Discretion of Agency Officials

As noted above, the Court in *Berkovitz* rejected a claim that the discretionary function exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. Instead, the Court held that liability under the FTCA is not precluded where the plaintiff can establish that the challenged act violated a specific, mandatory requirement that restricted the discretion of the governmental employees performing the act. *Berkovitz*, 108 S.Ct. at 1961-62.

Berkovitz involved an FTCA claim based on the federal government's licensing of an oral polio vaccine; the plaintiff contracted a severe case of polio after ingesting a dose of the vaccine. *Id.* at 1957. The plaintiff asserted that a government regulatory body, the Division of Biologic Standards ("DBS"), had issued a license without first -- as was required by statute and

regulation -- receiving from the vaccine manufacturer certain product testing data. The Court held the discretionary function exception inapplicable to this claim because the DBS had "no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive." *Id.* at 1962.

While the Court in *Berkovitz* permitted the plaintiff's FTCA claim to go forward, it emphasized the limited nature of this ruling. The Court held that "Congress intended the discretionary function exception to apply to the *discretionary* acts of regulators, rather than to all regulatory acts." *Id.* at 1960 n.4. In other words, so long as a plaintiff cannot point to a statute, regulation, or other federal policy whose specific mandate a regulator has violated while performing his regulatory functions, the plaintiff has no cause of action under the FTCA.[2] *See* Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 Chi. L.Rev. 1300, 1333 (1987).

That point is well illustrated by the Court's discussion of a second theory of liability raised by the plaintiff in *Berkovitz*. The plaintiff apparently alleged

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[2] The Court summarized its holding in *Berkovitz* as follows: "[T]he discretionary functions exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 1959. Since § 2680(a) explicitly insulates from liability all discretionary activity "whether or not the discretion be abused," the phrase "permissible exercise" should be read to mean activity that does not violate a specific and mandatory requirement; it should not be interpreted so as to exclude instances in which a regulator is alleged to have abused his discretion. *See generally*, Fishback & Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 Idaho L.Rev. 291, 323 (1989).

that the federal regulatory body, DBS, had incorrectly and negligently determined that the polio vaccine manufacturer had complied with certain regulatory requirements. The Court said that the applicability of the discretionary function exception to this allegation turned on whether one could determine with objective certainty whether the manufacturer had complied with the regulatory requirements. *Id.* at 1963. The Court said that if, as alleged by the plaintiff, the issue of the manufacturer's compliance could be determined by reference to objective scientific standards, then the discretionary function exception was inapplicable because regulators would have no need to make any discretionary judgments in the course of making that determination. *Id.* On the other hand, the Court said, if the issue of compliance could not be determined with objective certainty but instead required regulators to use a degree of subjective judgment, then the plaintiff's claim was barred by the discretionary function exception. *Id.*[3] In other words, the plaintiff could avoid application of the discretionary function exception only by showing that the applicable regulations mandated a finding that the vaccine manufacturer did not meet the regulatory requirements and that regulators at DBS nonetheless made a contrary finding.

Mr. Gaubert has not alleged that Bank Board officials violated any statute, regulation, or federal policy that restricts the discretion of Bank Board officials. Rather, Mr. Gaubert has merely alleged that those officials were negligent in the management direction they

[3] The Court declined to rule on the issue due to the "scanty record" before the Court; rather, the Court directed the District Court on remand to determine whether one could determine with objective certainty whether the manufacturer met applicable regulatory requirements.

gave to IASA officers and directors during the performance of their regulatory duties. Complaint ¶ 39. Regardless of whether Bank Board officials may have been negligent or may have abused their discretion in giving such management direction, *Berkovitz* dictates that Mr. Gaubert's claims are barred by the discretionary function exception.

C. *Indian Towing* Is Inapplicable to the Facts of this Case and Does Not Support the Court of Appeals' Attempt to Distinguish Between Policy Decisions and Operational Actions

In reversing the district court's dismissal of Mr. Gaubert's complaint, the Fifth Circuit relied heavily on *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *Indian Towing* is inapplicable to the facts in this case.

Indian Towing involved a claim under the FTCA for damages to cargo aboard a vessel that ran aground, allegedly owing to the failure of the light in a lighthouse operated by the Coast Guard. The plaintiffs contended that the Coast Guard had been negligent in inspecting, maintaining, and repairing the light. The Court found that the complaint stated a cause of action under the FTCA; however, the Court's decision did not touch upon the discretionary function exception, because the government had conceded the inapplicability of that exception. *Id.* at 64-65. The Court subsequently cited *Indian Towing* as a case that "illuminates the appropriate scope of the discretionary function exception." *Berkovitz*, 108 S.Ct. at 1959 n.3. The Court explained that while "the initial decision to undertake and maintain lighthouse service was a discretionary judgment, . . . the failure to maintain the lighthouse in good condition subjected the Government to suit under the

FTCA. . . . The latter course of conduct did not involve any permissible exercise of policy judgment." *Id.*

Indian Towing's holding in unexceptionable. Once a federal policy had been established to operate a particular type of lighthouse (a discretionary policy decision), operational-level Coast Guard personnel had no discretion to discontinue lighthouse operations. Accordingly, the discretionary function exception was inapplicable.

However, the Fifth Circuit misinterpreted *Indian Towing* as creating a distinction between "policy decisions" and "operational actions." *Gaubert v. United States*, 885 F.2d 1284, 1287 (5th Cir. 1989). The Fifth Circuit held that "policy decisions" (*e.g.*, the decision to operate a lighthouse) are covered by the discretionary function exception but that "operational actions" (*e.g.*, the failure to keep the lighthouse lighted, or the Bank Board's provision of day-to-day management advice to IASA) are not covered, even when the personnel undertaking such actions are empowered to exercise their discretion regarding how to carry out their duties. *Id.* There is no support in *Indian Towing* or any other decision of this Court for the policy decision/operational action distinction drawn by the Fifth Circuit. To the contrary, "operational action" is fully covered by the discretionary function exception provided that the action is discretionary in nature. *Varig Airlines*, 467 U.S. at 813. "[I]t is the nature of the conduct, rather than the status of the actor, that determines whether the discretionary function exception applies in a given case." *Id.*

Bank Board officials undeniably were engaged in discretionary conduct when they provided management advise to IASA. They were operating pursuant to regulatory statutes (principally, 12 U.S.C. §§ 1729 and 1730

(1988)) which gave them virtually unfettered discretion in dealing with federal insured institutions.[4] The mere threat that Bank Board officials would exercise some of their discretionary statutory powers generally was sufficient to permit them to wield considerable regulatory influence over such institutions.

The management advice given by Bank Board officials to IASA personnel no doubt can be characterized as being at the "operational" level. Nonetheless, they were able to exert such influence solely by virtue of their discretionary regulatory powers. Moreover, it cannot seriously be contested that the decision to exert their influence so as to affect day-to-day management decisions at IASA was "grounded in social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 814); Bank Board officials were pursuing a policy they believed most likely to protect depositors and minimize risks to the banking system. Accordingly, the decision of Bank Board officials to use their regulatory powers in this manner is a discretionary decision fully protected by the discretionary function exception.

Properly understood, *Indian Towing* does not create a distinction between "policy decisions" and "operational actions." The government could not invoke the discretionary function exception in *Indian Towing* not because the failure to keep the lighthouse lighted was an "opera-

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[4] For example, § 1730(b)(3) provided that if certain conditions were met, the Federal Savings and Loan Insurance Corporation ("FSLIC") "may, if it shall determine to proceed further" terminate an institution's insured status; FSLIC "may" issue cease and desist orders if "in the opinion of the Corporation" an insured institution is engaged in prohibited conduct (§ 1730(e)); FSLIC "may" under certain circumstances suspend any individual as an officer or director of an insured institution "if it deems it necessary" (§ 1730(g)(3)).

tional action" but because an established federal policy denied Coast Guard officials the discretion not to keep the lighthouse lighted. *Berkovitz*, 108 S.Ct. at 1959 n.3. Other "operational actions" that the Coast Guard might have taken would have been fully covered by the discretionary function exception. For example, if the established federal policy merely provided that the Coast Guard was to maintain a lighthouse without mandating any specifications for the lighthouse, the discretionary function exception would prevent claims that the Coast Guard should have used a more powerful light or that the lighthouse should have been taller. *See Chute v. United States*, 610 F.2d 7, 14 (1st Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

The Fifth Circuit's policy decision/operational action distinction, were it good law, would necessitate a reversal of the results reached by this Court in *Dalehite* and *Varig Airlines*. In both of those cases, actions found to be protected by the discretionary function exception undoubtedly would be classified as "operational actions" under the Fifth Circuit's definition. *Dalehite* found the exception applicable to claims, *inter alia*, that the government was negligent in failing to police properly the storage and loading of potentially explosive fertilizer. *Varig Airlines* found the exception applicable to claims, *inter alia*, that the government was negligent in certifying the installation of a defective heater into an airplane. In rejecting the notion that the exception could not be applied to operational actions, the Court stated in *Varig*:

> [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgement and decision there is discretion.

Varig Airlines, 467 U.S. at 811, *quoting Dalehite*, 346 U.S. at 35-36.

Moreover, *Indian Towing* was based at least in part on the notion that once a federal policy of maintaining a lighted lighthouse was established, shippers could reasonably rely on that policy being carried out. There is no similar notion of reliance in this case. The statement of the Fifth Circuit to the contrary notwithstanding,[5] there is no basis for a claim that Bank Board officials conducted their discretionary regulatory activities for the benefit of IASA stockholders. Indeed, in construing analogous bank regulation statutes, the Ninth Circuit found no indication that Congress adopted those statutes for the purpose of protecting stockholders and directors of national banks. *Harmsen v. Smith*, 586 F.2d 156, 158 (9th Circuit 1978). In distinguishing *Indian Towing*, the Ninth Circuit said, "bank examiners are not beacons to light the path of erring directors or gulled stockholders." *Id.*

In sum, the Fifth Circuit's reliance on *Indian Towing* in this case is wholly misplaced. Nothing in *Indian Towing* supports the Fifth Circuit's contention that discretionary government activity is not covered by the discretionary function exception when performed at the operational level.

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[5] *Gaubert*, 885 F.2d at 1290.

II. THE ABILITY OF FEDERAL REGULATORS TO POLICE FINANCIAL INSTITUTIONS WILL BE SEVERELY IMPAIRED IF REGULATORS MUST BE CONCERNED THAT THEIR EVERY ACTION IS SUBJECT TO SECOND-GUESSING IN THE FEDERAL COURTS

The magnitude of the financial crisis facing the thrift industry cannot be overstated. That crisis led Congress in 1989 to overhaul the entire federal regulatory structure for thrift institutions, by enacting the Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA"). FIRREA created a new body, the Office of Thrift Supervision (OTS), to assume many of the oversight functions previously performed by the Bank Board. Congress directed OTS to be "vigilant and responsive" in its regulation of the nation's thrifts. H.R. Rep. No. 54, 101st Congress, 1st Session, Pt. 1, at 291 (1989).

The ability of OTS (as well as the Office of the Comptroller of the Currency ("OCC"), which performs a similar oversight role for banks) to police financial institution will be severely hampered if the Court permits FTCA suits alleging negligent supervision to go forward. Permitting such suits will inevitably bias regulators toward those more formal regulatory actions (such as appointment of a receiver) that are generally recognized as falling within the discretionary function exception,[6] thereby reducing the range of options avail-

[6] Even the Fifth Circuit recognized in this case that the discretionary function exception barred FTCA suits over the more drastic regulatory actions taken against IASA, such as the decision to (continued...)

able to OTS and OCC in responding to perceived problems at financial institutions.

Mr. Gaubert clearly is unhappy with the range of informal regulatory actions taken by Bank Board officials in their dealings IASA; Mr. Gaubert contends that those informal regulatory actions were so extensive that Bank Board officials had a significant say in all major management decisions made by IASA officials.[7] However, the alternative to those informal actions would have been drastic, formal regulatory actions against IASA, actions that likely would have displeased Mr. Gaubert at least as much. Moreover, OTS and OCC have finite resources and ought to be free to decide to conserve those resources by exercising informal "jawboning" regulatory tools, tools that require far fewer human resources than do formal regulatory proceedings.

[6] (...continued)
replace IASA's Board of Directors with individuals acceptable to the Bank Board. *Gaubert*, 885 F.2nd at 290.

[7] Mr. Gaubert apparently wishes the Court to treat the informal regulatory actions taken by Bank Board officials as tantamount to an actual takeover of IASA by those officials. However, none of the factual allegations in Mr. Gaubert's complaint would support a claim that Bank Board officials actually controlled IASA's management in any formal sense. IASA officers, directors, and stockholders were free at any time to take actions contrary to the Bank Board's wishes – subject, however, to the knowledge that Bank Board officials were more likely to initiate formal regulatory proceedings against IASA and its officers/directors if they failed to heed the officials' advice. Paragraph 40 of Mr. Gaubert's complaint demonstrates that IASA's officers, director, and stockholders fully understood that IASA was not under the direct control of Bank Board officials; Paragraph 40 indicates that in January 1987, stockholders defeated the Bank Board-endorsed slate of directors and replaced them with directors that had served on the board prior to the active involvement of Bank Board officials in IASA's affairs.

Regulatory officials view informal regulatory procedures -- such as voluntarily executed written agreements, letter agreements, and business plans -- as "a valuable informal method of guiding the institutions that have not deteriorated to the level of a formal enforcement action away from potential problems." Testimony of FDIC Chairman L. William Seidman before the Senate Judiciary Committee, July 24, 1990, at 22. If the Court forces OTC and OCC toward greater use of formal regulatory proceedings by finding the discretionary function exception inapplicable to this case, the Court will have impaired the ability of OTS and OCC to provide current levels of regulatory supervision within existing budgetary constraints. As the Court noted in *Varig Airlines*, Congress adopted the discretionary function exception to prevent just such impairment of federal regulatory activity:

> By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163 (1963).

Varig Airlines, 467 U.S. at 814.

Moreover, the government's ability to recover the costs of the S&L bailout from culpable S&L executives[8]

[8] The number of S&L executives suspected of wrongdoing in connection with the collapse of their S&L's is substantial. According to L. William Seidman, Chairman of the Federal Deposit Insurance Corporation, more than 50% of the thrifts controlled by the Resolution Trust Corporation ("RTC," the entity established under FIRREA to manage the assets of failed thrifts) have had (continued...)

will be impaired if limited resources have to be diverted to the defense of FTCA claims brought by those executives. Over 18,000 criminal referrals have been made to the Department of Justice over the past three years in connection with the thrift industry. Statement of Timothy Ryan, Director of OTS, before the Subcommittee on Criminal Justice of the Senate Judiciary Committee, July 24, 1990, at 6. The Department of Justice has been able to target only a fraction of those referrals. OTS, FDIC, RTC, and Justice Department representatives recently met to compile a list of the 100 criminal referrals that should receive the highest priority within the Justice Department. *Id.* at 6-7. The fact that such a list has had to be prepared underscores the federal government's inability to address fully all legal issues arising in connection with the S&L crisis. Allowing stockholders and creditors of failed thrifts to sue the federal government under the FTCA would compound the government's difficulty in addressing all such issues by draining away the legal staff required to defend the FTCA suits. As *Varig Airlines* states, Congress included the discretionary function exception within the FTCA to prevent the occurrence of just such a scenario. *Varig Airlines*, 467 U.S. at 814.

[8] (...continued)
suspected criminal conduct referred to the Department of Justice; in about 40% of RTC-controlled thrifts, insider abuse and misconduct contributed significantly to the thrift's insolvency. Testimony of L. William Seidman before the Senate Judiciary Committee, July 24, 1990, at 9. FDIC and RTC currently are conducting investigations of alleged wrongdoing at 1,300 thrifts and have filed more than 500 civil lawsuits against former directors, officers, and other professionals to recover damages ranging from $1 million to $1 billion. *Id.* at 13.

CONCLUSION

Amici curiae respectfully request that the decision of the court of appeals be reversed and that this case be remanded to the district court with orders that plaintiff's complaint be dismissed.

Respectfully submitted,

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